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No. 94-525

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

CHARLES C. SMITH, JR., et al. - - Petitioners,

versus

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET, et al. - - - Respondents.

Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

PETITIONERS' REPLY BRIEF IN SUPPORT

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PETITIONS' REPLY BRIEF IN SUPPORT

The Petitioners, Charles C. Smith, Jr., M.D., Fred L. Barnett, M.D., William B. Monnig, M.D., and the Kentucky Medical Association, submit this Reply Brief in Support of their Petition for Writ of Certiorari.

I. THE DUBIOUS APPOINTMENT OF SPECIAL JUSTICES TO THE KENTUCKY SUPREME COURT MERITS REVIEW BY THIS COURT.

The Respondents have failed to present any rationale for this Court to decline review of the Kentucky constitutional procedure employed by Kentucky's Governor to appoint three special justices to the Kentucky Supreme Court. The Respondents' basic argument is (1) Governor Jones did what he was constitutionally obligated to do; and (2) the Petitioners have not proven any actual bias by the three justices appointed. This position is hollow, indeed,

and does not address the essence of the due process claim raised by the Petitioners; namely, that the appearance of a substantial conflict of interest in the appointment process violated their right to due process.

The Petitioners recognize that Governor Jones followed the letter of Kentucky Constitution § 110(3) in appointing the three special justices. This is not the issue. The issue is whether, under the extreme facts and circumstances of this case, Section 110(3) *as applied by Governor Jones*, violated the Petitioners' federally protected due process rights! In their Response, the Respondents fail to even mention, much less address, the "appearance" standard set forth by this Court in *In Re Murchison*, 349 U.S. 133, 136 (1955):

> This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true . . . denies . . . due process of law." Tumey v. State of Ohio, 273 U.S. 510-, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 1, 113.

See also, Marshall v. *Jerrico*, 446 U.S. 238, (1989) which held that an impartial tribunal "preserves both the appearance and reality of fairness." Certainly it would be perverse for this Court to impose an "appearance" standard for a trial court, where relief from any prejudice may be obtained *via* appeal, and to disavow such a standard for the state's highest court, where no judicial review is available.

The principal case cited by the Respondents, *Liteky* v. *United States*, ___ U.S. ___, 114 S.Ct. 1147 (1994), is not

apropos. There, a federal trial judge was asked to disqualify himself because of a series of rulings and statements made in an earlier proceeding deemed by the defendant to be unfair and hostile. The motion was tested under 28 U.S.C. § 455(a), which requires judges to disqualify themselves if their impartiality might be questioned. In ruling against disqualification, this Court noted that all of the alleged acts of the judge were rulings or statements made in a judicial proceeding, and were not based upon an "extrajudicial source". ___ U.S. ___, 114 S.Ct. at 1157. The current Petition for Writ of Certiorari, though, is based precisely on an appearance of bias or prejudice caused by an "extrajudicial source" — namely, that Governor Jones' appointees would naturally favor the public position taken by the Governor, and the legal position taken by the Governor's Cabinets. Justice Kennedy's concurring opinion in *Liteky* (which was cited by the Respondents) does not challenge this position. To the contrary, the concurring opinion declares:

> For present purposes, it should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have grounds to question the neutral and objective character of a judge's rulings or findings.

Certainly in the case at issue here, the petitioners *and the public*[1] knew as soon as Governor Jones made the appointments that there were going to be at least three votes in favor of the constitutionality of House Bill 1. Given Governor Jones' public and personal interest in this litigation, would he ever appoint someone whose "state of mind" was not aligned with his own?

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[1]Members of both the public and the press uniformly gave Petitioners bemused smirks when discussing the appointments.

The Respondents emphasize that the Petitioners have not shown actual bias or prejudice on the part of the three special justices. As an initial point, the Petitioners are not specifically challenging the decision of the three appointees not to recuse themselves; instead, the challenge is to the procedure that got the justices appointed in the first place. Moreover, as set forth in our Petition, *actual* bias or prejudice need not be shown.

The weakness of the Respondents' position can best be demonstrated by the circumstances of this case. After Governor Jones' initial three appointments, one appointee, Mr. Sheryl Snyder, recused himself. This recusal came only after it was publicly disclosed that a wholly owned subsidiary of Snyder's employer, I.C.H. Corporation, held a multi-million dollar contract with the state of Kentucky and is bidding on its retention. *See* Mr. Snyder's recusal letter included at page 23a of the Appendix to the Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky (No. 94-504) filed by a different group of petitioners in this case on September 16, 1994. Surely this fact was known to both Governor Jones and Mr. Snyder at the time of his appointment. Yet the appointment and acceptance occurred anyway. This circumstance illustrates more than the likelihood, but indeed demonstrates the certainty, that Governor Jones intended to place on the Supreme Court of Kentucky persons who would have a reason to vote with the Governor on the issue being litigated.

If this were not enough, the Respondents' position suggests that the Petitioners should have taken discovery from Governor Jones or the appointed state justices to determine if any actual bias existed. Yet how could the Petitioners take the deposition of Governor Jones to determine the factors that influenced his selection process? And how could the Petitioners serve interrogatories on the three

justices to determine their campaign contributions, their political alliances and aspirations, or whether they had discussed this case in any way with Governor Jones? The futility of this endeavor is precisely why actual bias need not be proven, but, instead, only the appearance of a conflict is enough to violate due process standards.

II. REVIEW SHOULD BE TAKEN BECAUSE THE KENTUCKY TAX ON MEDICAL PROVIDERS VIOLATES FEDERAL EQUAL PROTECTION STANDARDS

The Petitioners presented extensive reasons to this Court why review should be taken to determine whether Kentucky's special tax on physician's gross revenues to fund the Medicaid program violates federal equal protection standards. *See* pp. 17-22 of Petitioners' Petition for Writ of Certiorari. The Respondents' answer to the Petitioners' assertions is simply to bury their heads in the sand. Rather than even *mention* equal protection principles, the Respondents' argue that review should be denied because the Supreme Court decision "rests on the independent and adequate non-federal grounds of the Kentucky Constitution Section 59 and the state cases construing that section." Respondents' Brief at p. 9. This position reveals a complete misunderstanding of federal constitutional law. The standard relied upon by the Respondents' applies *only* when the application of a state law *avoids* a federal constitutional issue; here, the application of a state law *creates* the federal constitutional issue sought to be reviewed.

The Respondents' reliance upon *Michigan* v. *Long*, 463 U.S. 1032 (1983) is misplaced. There, the issue was whether the Michigan Supreme Court properly held evidence to be inadmissible in a criminal trial. The defendant argued to this Court that the ruling should not be reviewed because it was based on strict state evidentiary standards, rather

than upon federal constitutional principles. This Court held that the Michigan Supreme Court relied primarily on federal standards, and thus accepted jurisdiction. *See* 463 U.S. at 1043.

The principles set forth in *Michigan* have no bearing whatsoever on this case. The Kentucky Supreme Court did not make any state adjudication of the Petitioners' rights which would obviate the need to rule on their federal equal protection claims. Indeed, the Court specifically ruled on these federal claims. *See* Appendix p. 8a of Petitioners' Petition for Writ of Certiorari. Moreover, merely because a classification scheme might satisfy a state constitutional standard does not mean that federal constitutional standards have not been violated. This Court in *Michigan* declared:

> The jurisdictional concern is that we not "render an advisory opinion and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Id. at 1042 (quoting *Herb* v. *Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 465, 89 L.Ed. 789 (1945)). Certainly a ruling in this case that the classification scheme created by House Bill 1 violated the Petitioners' right to equal protection under the Fourteenth Amendment to the United States Court could not be circumvented by a different ruling based on Kentucky state law.

The Petitioners have asserted legitimate arguments that their rights to equal protection have been violated - and the Respondents have completely ducked the issue. The Respondents' bizarre position manifests their inability to defend the Petitioners' claims, and is yet another reason to grant *certiorari* in this case.

CONCLUSION

For the foregoing reasons, as well as those presented in Petitioners' Petition for Writ of Certiorari, review of this case should be accepted by the Court.

Respectfully submitted,

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